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The Honorable Eugene Bigboy, Sr., Chairman
Bad River Band of the Lake Superior Tribe of Chippewa Indians
Chief Blackbird Center
1 Maple Street
Odanah, Wisconsin 54861

Re: Application for Treatment as State for purposes of Sections 303(c) and 401 of the
Clean Water Act

Dear Chairman Bigboy,

Pursuant to the Band's request, I am providing the following statement describing the jurisdictional basis for the Bad River Band of Lake Superior Tribe of Chippewa Indians' ("Band" or "Tribe") application for treatment as a state ("TAS") pursuant to the Clean Water Act (CWA) Section 518 (33 U.S.C. § 1377(e) and 40 CFR § 131.8(a)) to pursue the adoption of a water quality standards program under the Clean Water Act (CWA) § 303 (33 U.S.C. § 1313) and to adopt and implement the certification program found at CWA § 401 (33 U.S.C. § 1341). This statement is required as part of the authorization process under 40 C.F.R. Section 131.8(b)(3)(ii) (2005) and 233.61.

I have assisted the Tribe in preparation of its application, and will therefore reference portions of that application in this statement. Attachments referred to in this statement use the same references as, and are to be found in, the application itself.

As demonstrated in the attached application, the Band is eligible for such approval from the Environmental Protection Agency ("EPA") pursuant to Section 518(e) of the CWA, as it:

- (1) The Indian Tribe has a governing body carrying out substantial governmental duties and powers;
- (2) The functions to be exercised by the Indian Tribe pertain to the management and protection of water resources which are held by an Indian Tribe, held by the United States in trust for Indians, held by a member of an Indian Tribe, if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and

- (3) The Indian Tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Act and of all applicable regulations.

The Tribe has demonstrated in its application that all requirements are met pursuant to Section 518 of the CWA, and therefore, EPA should grant treatment as a state authority.

The surface waters of the Bad River Indian Reservation are, generally, of very high quality. The Tribe is proud of the fact that the Bad River Indian Reservation contains high quality wildlife habitat for many species, including some which are rare or endangered, and many other species of plants and animals. The Tribe wishes to maintain and, where necessary, improve the existing situation with an eye toward preserving the Bad River Indian Reservation for the long-term enjoyment and sustenance of present and future generations of its members. However, the Tribe sees growing degradation of its water resources and potential growing threats to the water quality and to those natural resources which depend upon the high quality of the reservation waters. These threats to tribal members' health and welfare, and the political integrity and economic security of the Tribe are associated with cumulative surface water discharges of pollution on and near the Bad River Reservation include failing septic systems, sedimentation, runoff, and erosion from land uses such as agriculture and forestry, and municipal wastewater discharges, as well as the potential for mining in over 30,000 acres of land in the Penokee range under the ownership of a subsidiary of US Steel.

The Bad River Band of the Lake Superior Tribe of Chippewa Indians ("Band") has requested authorization pursuant to the Clean Water Act (CWA) Section 518 (33 U.S.C. § 1377(e) and 40 CFR § 131.8(a)), to implement a water quality standards program under the CWA §303 and the certification program found at CWA § 401 (33 U.S.C. §§ 1313 and 1341, respectively).

1. The Governmental Body and Its Duties and Powers

The Tribe is a Sovereign and Recognized Government

The Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin (hereafter, 'the Band') is included on the Department of the Interior's published list of federally recognized tribes. See, 68 Fed. Reg. 68180 No. 34 (December 5, 2003).

Other evidence of federal recognition of the Bad River Band of the Lake Superior Tribe of Chippewa Indians includes, but is not limited to, the following aspects of the Tribe's historic and ongoing relationship with the federal government.

Negotiating and signing a series of treaties with the Federal Government;
See, e.g., Attachment A ("Treaty with the Chippewa, September 30, 1854, 10 Stat. 1109. Placement of the La Pointe Band (now known as the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Indian Reservation, Wisconsin)) on

the Bad River Reservation by the federal government by operation of the 1854 treaty.

The Tribe and its members possess collective rights in tribal lands and funds administered by the federal government.

Since 1936, the Band has been organized as a government pursuant to Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476. The Tribe's Constitution and Bylaws were adopted by the membership of the tribe and approved June 12, 1936 by the Secretary of the Interior and have been duly amended, and approved by the Secretary, from time to times depend for their health, welfare, and income.

2. Form of Government and its Powers and Duties

The Band's federally recognized government and its form sets the stage for the basis of its authority to regulate the waters of the Bad River Reservation. The Tribe's governing authority and its most basic political authority is rooted in the Tribe's need to care for its people and to protect those resources upon which its member depend for their health, welfare, and income. Without the authority to control the taking, use of, and impacts to its resources, the Tribe's political integrity is lost.

Source of authority

The authority of the Bad River Band to govern its members and others' activities within its territory stems from two sources: The historically rooted general recognition and agreement of the Band's members pursuant to the Tribal government's inherent sovereignty as an Indian tribe, as recognized by the United States government provide the first basis. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557-59 (1832); United States v. Mazurie, 419 U.S. 544, 557 (1975). The Band's constitution, adopted under Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) provides the second source. The Constitution and Bylaws of the Bad River Band (Attachment B) adopted by the Band's members were duly approved by the Secretary of the Interior on June 12, 1936. The Constitution and Bylaws include amendments approved by the Secretary of the Interior on December 1, 1942, October 31, 1944, April 25, 1977, March 8, 1978, and February 3, 1984.

Form of Government and Powers

The Band's Constitution provides that the Band is to be governed by a Tribal Council consisting of seven members elected by the tribal membership. Bad River Constitution Article III, §1. The Tribal Chairman, a member of the Tribal Council, presides over all Council meetings. The Tribal Chairman also serves as Executive Director, "at all times hav[ing] general supervision of the affairs of the Tribal Council and such matters as naturally pertain to the general welfare of the community." Bad River Constitution, Art. I, § 1. Bad River ByLaws Article I § 1.

The Tribal Council has established several administrative boards, which address specific

needs and issues within the community. These boards include the Police Commission, Health Board, Housing Commission, Elderly Advisory Board, Membership Committee, Education (JOM), Judgment Fund Committee, Title IX, Head Start Parent Policy Committee, Tribal School Board, JTPA, Repatriation Committee, Boys & Girls Club Board, Wild Rice Committee, Parks and Recreation Committee, Pow-Wow Committee. All boards and commissions are ultimately supervised by and report to the Tribal Council. Bad River Constitution, Art. VI, § 1(u). Other committees and boards are established on an ad hoc basis to deal with specific issues as they arise, such as a Wind Energy Committee, Septic System Evaluation Team, and Three Essential Community Facilities planning team.

The Constitution, at Art. VI, §1(q), authorizes the Tribal Council to establish a Tribal Court with jurisdiction to hear matters pertaining to “all actions arising” between persons or out of events that occur on the Bad River Reservation; alleged violations of ordinances in effect within the Bad River Reservation by members and non-members; and violations of ordinances by Tribal members within the Band’s ceded territory. Bad River Tribal Code §§103.1, 106.1(a). (Attachment C) The Tribal Council has also established a Court of Appeals to review trial level decisions. Bad River Tribal Code §103.9. Wisconsin is a Public Law 280 state, which means that the State of Wisconsin enforces its criminal laws within the Bad River Indian Reservation (and in most other portions of ‘Indian country’ situated within the state). However, regulation of hunting and fishing rights is specifically excluded. See, 18 U.S.C. §1162(a). State civil jurisdiction is described at 28 U.S.C. § 1360(a) but essentially consists only of adjudicatory (rather than regulatory) jurisdiction. Bryan v. Itasca County, 426 U.S. 373 (1976). This grant of civil jurisdiction to states did not deprive the tribal courts of concurrent jurisdiction, nor did it extend a grant of civil regulatory authority to states within the exterior boundaries of reservations (“Indian country”) or deprive the Tribe of its jurisdiction over natural resources.

3. Capability

As demonstrated in the application, the Tribe exercises capably governmental programs within its authority. Under the Tribe’s Natural Resources Department, a well-qualified staff will administer this program through the Tribe’s water office, which has monitored the quality of the waters of the reservation for many years.

Basis for The Tribe’s Assertion of Authority for Treatment as State for Purposes of Sections 303(c) and 401 of the Clean Water Act

The regulations at 40 C.F.R. § 131.8(b)(3) require the Band to provide a descriptive statement of its authority to regulate water quality, including (A) a map or legal description of the area over which the Band asserts authority to regulate surface water quality; (B) a statement which describes the basis of the Band’s assertion of authority; (C) copies of documents which support the Band’s assertion of authority; and (D) identification of the surface waters for which the Band proposes to establish water quality standards.

The map (A), copies of documents(C), and identification of surface waters (D) are contained within the application, as is discussion of the basis of the Band’s assertion of authority,

which is reiterated and further expanded upon here.

The Band's authority to set water quality standards for all waters within the Bad River Reservation (including navigable waters and waters contained within or flowing through non-Indian owned fee land) stems from two sources: the Band's inherent sovereignty over its territory, as recognized by the United States government in the Treaty of 1854, and as affirmed in its Constitution, approved by the United States Government in 1936 and its approved amendments; and by delegation from the United States Congress in the 1987 amendments to the Clean Water Act.

A. Inherent sovereign authority

The Band derives its authority to set water quality standards applicable to the entire Bad River Reservation from the tribal government's police power to protect all persons within the exterior boundaries of the Reservation and to preserve the well-being and existence of the Band. These powers are part of the Band's inherent sovereign power that has existed since time immemorial, and are recognized by the Band's Treaty with the United States Government and its Constitution and By-Laws. The sovereign power of the Band is recognized in the Commerce Clause to the U.S. Constitution and in well-established principles of federal Indian law as set forth in opinions of the U.S. Supreme Court. See, e.g., Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832); Williams v. Lee, 358 U.S. 217 (1959); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); United States v. Wheeler, 435 U.S. 313, 327 (1978); Montana v. United States, 450 U.S. 544, 564-66 (1981); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 (1982); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 n.16 (1983); National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987); Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408 (1989).

EPA has previously recognized, and the courts have affirmed, that tribes are vested with sufficient regulatory authority over both tribal members and nonmembers engaged in activities on Indian reservations to allow for the establishment of tribal water quality standards and certification programs. Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001) *cert. denied*, Montana v. EPA, 137 F. 3d 1135, 1138, 1141 (9th Circuit 1998), City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996).

The Treaty of 1854

The Band's authority over its territory was recognized by the United States government in the Treaty of 1854, by which the Band reserved to itself the territory and resources within the Bad River Reservation in exchange for its interest in land in northern Wisconsin beginning just south of the Lake Superior basin, except for those areas reserved for the specific bands, and reserving rights to hunt, fish, and gather in those territories, including both ceded and reserved areas. As the Supreme Court noted in New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), the sovereignty retained by a Tribe under its Treaty with the U.S. includes its right to regulate use of its resources by members as well as nonmembers. The Court stated, "in Montana

v. United States, we specifically recognized that tribes in general retain this authority.” New Mexico v. Mescalero Apache Tribe, at 337. Resources of the Bad River Band are principally dependent upon and necessarily include water.

The Bad River Constitution

In its Constitution, approved by the membership of the Bad River Band in 1936, the Band established a constitutional government to exercise its inherent sovereign powers. The Constitution asserts the Band’s authority over all lands within the original boundary lines established by the Treaty of September 30, 1854. Bad River Constitution Art. I §§ I and II. The Constitution grants the Tribal Council the power “[t]o enact ordinances governing the planning, zoning and other use relating to all lands and water areas within the exterior boundaries of the Bad River Reservation regardless of land ownership.” *Id.* Art. VI, § 1(w). The Constitution also authorizes the protection and enhancement of natural resources, which necessarily includes water quality. *Id.* Preamble and Art. VI, Section 1(n).

The Band’s Constitution was established under the auspices of the federal Indian Reorganization Act, 25 U.S.C. § 476, 48 Stat. L. 984 (June 18, 1934). The Band’s Constitution, including the provisions delineating the territory under the Band’s authority and establishing the power of the Tribal Council to regulate waters within the Reservation regardless of land ownership, was approved by the Secretary of the Interior according to the terms of the Indian Reorganization Act in 1936. The United States has thus officially recognized the Band’s authority to regulate water quality within the areas for which approval is sought in this application.

Authority to Regulate Waters on Non-Indian Owned Fee Land—Threats to the Political Integrity, the Economic Security, and the Health and Welfare of the Tribe

EPA promulgated rules under Congress’s delegation of authority in the CWA, which require a Tribe to demonstrate the impact of non-member activity on waters within the reservation and the Tribe’s political integrity, economic stability, and the health and welfare of its members. The EPA requires a Tribe to demonstrate, through a “relatively simple showing of facts that there are waters within the reservation used by the Tribe or tribal members (and thus that the Tribe or Tribal members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters and critical habitat are subject to protection under the CWA.” 56 Fed. Reg. at 64,879. The Tribe then needs “assert that impairment of such waters by the activities of non-Indians would have a serious and substantial effect on the health and welfare of the Tribe.” *Id.* Because of the importance of water quality to the Tribe, the EPA presumes an adequate showing of tribal authority over fee lands, unless another government demonstrates that the Tribe lacks that authority. *Id.*

The Band’s authority to regulate reservation waters extends to those waters contained within, or flowing through, non-Indian owned fee lands within the Reservation. The U.S. Supreme Court recognizes that tribes retain such authority where the behavior to be regulated “threatens or has some direct effect on the political integrity, the economic security or the health

or welfare of the Tribe,” Montana v. United States, 450 U.S. 544, 565-66 (1981), or with express Congressional delegation. *Id.* at 564. The Band agrees with the EPA that the Supreme Court’s decision in the subsequent case Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408 (1989), is “fully consistent with Montana” in this regard. 56 Fed. Reg. 64, 877 (1991).

The pollution of surface waters within the Bad River Reservation threatens the political integrity, the economic security, and the health and welfare of the Band. Tribal members use the Reservation surface waters for a variety of purposes, including fishing, trapping, hunting, gathering, swimming, boating, and religious and cultural ceremonies. The Bad River Band chose the territory of the Bad River Reservation for its home specifically because of its water-dependent resources. Serious threats are founded in scientific fact and are not mere speculation. Without control over its resources, the Band’s political control is threatened, as is its economic security by threats to the resources upon which members harvest for income, and the pristine beauty and natural resources quality which draws tourists to the reservation. The important resources of the Tribe and the real and existing threats to these resources are described in the following narrative. Several courts have acknowledged this deep connection between the Band, its members, it’s political and legal rights, and the natural environment, most importantly – water. State of Wisconsin v. EPA, 266 F.3d 741, 745 (7th Cir. 2001); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin, 653 F. Supp. 1420, 1424 (W.D. Wis. 1987); Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, 781 F. Supp. 1385, 1389 (W.D. Wis. 1992); Reich v. Great Lakes Fish and Wildlife Commission, 4 F.3d 490, 492 (7th Cir. 1993).

Water Resources of the Bad River Reservation.

The Bad River Reservation is a "water-rich" environment located in northern Wisconsin on the shores of Lake Superior. The Bad River is the largest river in Ashland County, flowing 70 miles into Lake Superior. The entire 1000 square- mile Bad River/Kakagon River watershed, located in parts of Ashland, Bayfield and Iron counties of northwestern Wisconsin, is exceptionally intact with only three small dams located within the myriad of 27 named streams and rivers. The 124,655-acre (194 square miles) Bad River Reservation is located within the northern third of the Bad River Watershed on the shores of Lake Superior. The Tribal communities of Odanah, Birch Hill, Franks Field, and Diaperville are located at the northern end of the Reservation along US Highway 2. The majority of the Reservation is forested. There is a non-member small farm community on the south end of the Reservation, upstream from the Tribal residential areas.

Numerous rivers, streams, lakes, ponds, and wetlands, as well as groundwater, make up the water resources landscape of the Reservation (see maps in Attachment D). All of the water of the entire 1000-square mile Bad River/Kakagon River Watershed flows north through the Bad River Reservation to Lake Superior. These two rivers historically emptied as one into Chequamegon Bay, although more recently the Bad River bed migrated, and it now empties to the east of the Bay directly into Lake Superior.

The Kakagon/Bad River wetland complex, at the confluence of the rivers with Lake Superior, is a 16,000-acre wetland in nearly pristine condition, hosting a rich assembly of flora and fauna. The wetland resources within the Bad River Reservation comprise about 40% of all coastal wetlands within the Lake Superior basin and may be the healthiest fully functioning estuarine system in the Upper Great Lakes.

These water resources have provided subsistence, cultural, and spiritual benefits to many generations of Bad River Ojibwe. The Kakagon Slough, at the mouth of the Kakagon River on Lake Superior, holds the largest remaining wild rice beds on the Great Lakes and is an integral part of the lives of the Tribal members. The Bad River Band's identity and social cohesion is dependent on the continuing supply and quality of the Reservation's wild rice. See, for example, Vennum, pp. 74, 195-196. (Attachment F) The wild rice is a primary component of the migration story, the history of why the Ojibwe came to this place. Wild rice harvesting has been a cornerstone of tribal culture, subsistence, and commercial enterprises for several generations. The Tribe's annual Manomin (wild rice) Celebration is held at rice harvest time to celebrate the importance of this life-giving resource. Wildrice is a year round dietary staple and essential part of feasts and other ceremonies (Attachment G). Recently, the Public Broadcasting show Tastes of America taped a segment on the Bad River Reservation, chosen specifically because of the quality of its wild rice and the importance of that wild rice in the diet of the Bad River Band.

Harvest records for rice are not taken systematically. The quality and amount of wild rice also varies year to year. There are four to five wild rice processors on the Reservation. Some processors keep very detailed records of how much they processed for each harvester. This allows some estimates of quantity. Anywhere from 9,000 to 15,000 pounds of rice are processed each year by 24 to 36 families. The wild rice is harvested by a two-person team in a canoe. One canoe team can harvest 80 to 120 lbs of rice a day. Not all the rice in the Sloughs is taken every year. Traditional methods allow rice to fall back into the water for re-seeding. Some harvested rice is purchased green by the Tribal Natural Resources Department for re-seeding in specific areas. Waterfowl and other birds and animals also feed on the rice. Most of the harvested rice is consumed in the home, shared among family and friends, and used in ceremonies and feasts. Some is sold to local stores and may be re-sold for \$13 - \$16/pound. Loss of ricing opportunity presents a threat to the economic security of the Tribe. This harvest has a monetary potential of over \$200,000 per year, however that does not begin to describe the worth of wildrice to the Tribe.

Waterfowl and fish, especially walleye, are harvested for subsistence purposes annually on the Reservation. All Tribal members have the right to hunt, fish and harvest on the Reservation. The Tribal Hatchery has been in operation since 1968. In the last few years, the Tribe has completed many facility improvements to a total investment of 1.7 million dollars. The Hatchery now operates on solar and wind power reducing energy needs. In 2005, the hatchery produced 12 million walleye fry, 500,000 walleye fingerlings, 13,5000 extended growth walleye and 1.2 million perch fry. These fish are released into reservation waters. This operation employs Tribal members and the fish released benefit Tribal members and non-Tribal fisherman. The ability to raise fish depends on maintenance of the good quality of the Kakagon River.

Water from the river is drawn to hatch eggs and raise fingerlings in two rearing ponds any degradation in the dissolved oxygen content, for example, due to eutrophication of the waters would negatively impact the Tribes Hatchery operation.

The riparian areas bordering the streams and rivers are important habitat for wildlife as are wetlands. Tribal members hunt and trap various animals such as beaver, muskrat, mink and otter. These animals depend on specific riparian and wetland habitats for shelter and food. The deer also depend on these types of habitat and are another staple dietary food for Tribal members.

Most importantly, water is a primary component in the creation story of the Anishinabe people, and its protection and quality are the essence of survival, both physically and spiritually. (Attachment I). Water ceremonies are held every spring and fall. The spring ceremony gives thanks to the Creator for allowing the water to flow again, asks for the safety of the fish hatchery crew and other Tribal members as they work to protect the waters, and asks for the healing of the water itself. The fall ceremony gives thanks for all the life the water gave that season and the harvest the Tribe benefited from, and asks for blessing on the water as it sleeps again.

Until the late 1990's, the Band had no background data on contaminants in the streams, sediments, and groundwater of the Reservation. A contaminant survey was undertaken by the Water Resources Office with funding from the USEPA in the 1998 field season. Surface water and sediments from major tributaries within the exterior boundaries of the Reservation were analyzed for metals, mercury, pesticides, PCBs and dioxin/furan. Groundwater samples from private wells and community wells were analyzed for a similar suite of contaminants.

The results of the sediment and surface water contaminant survey in 1998 showed the Reservation to be largely pristine. No PCBs or mercury were detected in 30 surface water and sediment samples. Low levels of DDE were detected in one soil sample and low levels of gamma-BHC were detected in one water sample. Detected metals included barium, chromium, copper, and zinc at levels that appear to be relevant to the underlying geology. Low levels of several dioxin congeners were detected. Currently air deposition is considered to be the source. These levels were lower than other detects found in other studies of dioxins in sediment around the Great Lakes. The groundwater analysis results showed one old well and one new well with pipes leaching lead and several uncertain detections of dioxin/furans. These low level detections may be due to a volcanic geological history. Groundwater analysis is carried out on several private wells periodically for metals, volatile organics, semi-volatiles and dioxin/furans because of concern over the two papermill sludge sites located within the Reservation.

Groundwater is currently the only source of drinking water on the Reservation. The surface waters are hydrologically connected to groundwater throughout the Reservation. (Attachment J) The groundwater recharge area is upland in the southeast end of the Reservation and areas south of the Reservation. Surface water and groundwater interface in the recharge area and at the many streams and rivers throughout the Reservation. Surface water quality thus affects the quality of reservation groundwater, which serves as the principal source of water for both tribally-operated public supply wells and private drinking water wells. Thus, tribal members

could be exposed by ingestion to pollutants that migrate from surface waters into groundwater. For this reason, and because the mobile nature of water-borne pollutants makes it practically impossible to separate the effects of water quality impairment on non-Indian fee lands from those on tribal properties, the Band finds that establishment of reservation-wide tribal water quality standards is necessary for the proper management of reservation water quality and the protection of tribal health and welfare.

Current water quality threats the Band is facing.

The political integrity, economic security, and health and welfare of the Band is seriously threatened by impacts to the quality of the waters of the Bad River/Kakagon watershed. The majority of sources of these threats tend to be that of land use practices (sedimentation and erosion is the major threat to this watershed) and rural wastewater treatment, although air deposition is a source of mercury contamination in fish. All of these waters flow through the Sloughs, on which the Tribe is economically, culturally and subsistence dependent, and lower the quality of this otherwise basically pristine area.

1) Agricultural Influence

The Bad River Natural Resources Department began a monitoring program and water lab in 1997 looking at basic nonpoint source indicators, macroinvertebrates and stream flow measurements. This monitoring program operates according to Bad River's EPA-approved Quality Assurance Project Plan. Monthly sampling occurred at 24 stations for five years in order to establish background ambient water quality. The Bad River Natural Resources Department has continued seasonal monitoring after this period.

Analysis of samples from sites on the Marengo River just upstream of the Reservation (at a site downstream of agricultural areas and the Town of Marengo), and on the Reservation has shown high fecal coliform and E.coli counts since the inception of monitoring in 1997. (Attachment K) This data show that the water of this river is impaired before it enters the Reservation. It is, therefore, all the more important that the Tribe be able to protect all waters from negative impacts within the Reservation to prevent injury to its membership and their uses of the waters. Staff from the WDNR have stated that as the Town of Marengo is unsewered, there is no WPDES permit and the situation would fall under County Zoning. County Zoning and Shoreland laws would also apply in agricultural areas contributing to nonpoint source pollution off Reservation.

Nonmember agricultural areas on the south end within the Reservation have been seen to be contributing to nonpoint source pollution of the Marengo River as well. There are approximately 31 farmed properties on the south end on both sides of the river, this includes lands with livestock as well as fields mowed for hay (Attachment L). These are family farms with usually fewer than 300 acres of land. No information is currently available about the number of livestock at each farm, but by visual estimations these farms do not have the number of livestock to qualify them as concentrated animal feedlots. The County estimates that the average farm within the County has 62 cows.

Water sampling downstream of a small beef farm on a tributary to the Marengo River within the Reservation has shown high nutrient concentrations (phosphate max. of 0.43 mg/L) and high bacterial counts (E.coli 4240 CFU/100mL and fecal coliforms 4480 CFU/100 mL – both above USEPA guidelines and State WQS) as well as slightly elevated dissolved and suspended solids. (Attachment K)

County Zoning laws are not applicable on private lands within the exterior boundaries of the Reservation. The area is rural, the farms are smaller than regulated by State laws. Management of agricultural waste in the watershed as a whole is often negligent, with cattle fenced directly into waterways, manure spread at times when the land is frozen, and winter manure piles bulldozed into waterways during the spring thaw. These practices, on the Reservation, increase erosion of streams and introduce nutrients. The streams may then experience changes in in-stream habitat and lowered dissolved oxygen. This degradation threatens the downstream rice beds and the Tribe's ability to continue to fish these waters as well as their management of fish through the hatchery operation.

Macroinvertebrate data using the Hilsenhoff Biotic Index generally show Good to Excellent quality streams. (Attachment M) These categories indicate "moderate" to "little" nonpoint source influence to the streams. Aquatic communities are known to respond positively to slight nutrient additions, however greater nutrient additions can easily cause nuisance algal blooms, low dissolved oxygen and negative impacts on all aquatic organisms.

2) Residential discharges

The watershed within which the Reservation is located has one permitted industrial discharger (Columbia Forest Products – hardwood and veneer), but several municipal wastewater lagoons are permitted under the Wisconsin pollution discharge elimination system (WPDES). Municipalities surrounding the Reservation at best use lagoon systems to treat wastewater, many are unsewered and rely on failing septic systems. Discharge permits are issued by the Wisconsin Department of Natural Resources. These permits are based on best available technology limits and systems are currently not required to monitor for phosphate. According to River Alliance report June 2004, WDNR has lost 6 permit staff since 2002. (Attachment N)

Findings from the Tribal water-monitoring project indicate several areas of point and nonpoint source pollution. Several sites often show higher levels of nutrients and/or fecal coliforms indicating nonpoint source pollution. Fecal coliform counts above WDNR's standard of 200 CFU/100 mL have been found to occur frequently downstream of several small towns upstream of the reservation. Most of the towns in this watershed are small, rural towns relying on lagoons for the treatment of wastewater. Many households are older and rely on older failing septic systems. Municipal and residential wastewater that is not properly treated may contain disease carrying microbes as well as contaminants such as excess nutrients, solvents and metals. These negative impacts also threaten ceremonial uses that may include ingestion of the water or its use in sweat lodges.

More commonly, homeowners in the rural watershed rely on private septic systems. Several rural communities and lands in private ownership have numerous older, failing septic systems and many homes on the major rivers and small streams still have pipes draining directly into the water. A large number of these septic systems were probably placed 30 or 40 years ago, and are likely located in the red clay plain which does not leach and requires mound systems.

The Tribe has begun an inventory of Tribal member and non-member septic systems on the Reservation. There are an estimated 166 septic systems, 115 Tribal households and 51 non-Tribal. Data indicate a septic failure rate of approximately 70% for the 125 member and nonmember systems inventoried to date. (Attachment O) Many get little or no upkeep or maintenance. The Bad River Natural Resources Department is dedicating staff time and effort into exploring methods of setting up a cooperative to assist homeowners with septic maintenance and replacement with the help of several governmental agencies in the region.

Ashland County population forecasts for 2006-2025 predict that Townships surrounding and within the Reservation will continue to grow at approximately 2.5 percent (Attachment P), which would lead to several hundred new households. The Town of Sanborn is located entirely within the Reservation, while the Towns of White River and Gingles are located partially within the Reservation. Land use activities are now the leading pollutant of the nations waters. Several hundred new households on the Reservation would have the potential to add substantially to land clearing and sedimentation and erosion into rivers and lakes. Tribal water quality standards are an important tool to allow the Tribe to protect its water resources for future generations.

There are also approximately 40 non-member owned cabins in the Kakagon Sloughs used for summer recreation and/or hunting and fishing camps. In 1997, the Tribe began an investigation into the conditions at these cabins that affect water resources after members complained. A number of these cabins have outhouses that are over open water or filled with water, as the land relief is very low and the water table high, especially during wetter years. Waters in wetlands adjacent to several such outhouses were tested in 1998. Results showed nitrate levels seven times the background sample (taken in an unaffected area) and phosphate levels 40 times background levels at the worst of the sampled sites (Attachment Q). There are a number of cabins with household trash piled in wetland areas, unregulated docks or shore land armor and at least one underground storage tank for heating oil. County Zoning (local ordinances for housing and shoreland protection) does not apply within the exterior boundaries of the Reservation. Thus the situation persists. Follow up on this situation in 2004 found that while some of the cabins had cleaned up waste piles, many had not. Outhouses are still precariously close to wetlands and over open water even in this low water year. Three new cabins were found and are suspected of being located illegally on Tribal land.

The impact of these improper practices to surface waters and wetlands is an increased rate of eutrophication and lowering of oxygen levels in areas fished and riced by Tribal members. The authority to protect all waters of the Reservation is very important to the Tribe's ability to protect its members.

3) Forestry Impacts

One of the largest threats to water quality in the Bad River watershed as a whole is forestry practices. The watershed is primarily forested (over 89%) with mixed forests predominating. Over 14% of the watershed is controlled by commercial interests, particularly timber and mining industries. The other portion is private landowners who may or may not be following Best Management Practices for protection of water resources. Over 2% of the watershed is clearcut every year, and not all of the remaining cuts use Wisconsin Best Management Practices. These cuts result in significant impacts to the water resources of the reservation. Clearcutting of upland hardwood and conifer forests can increase local streamflow by as much as 80% and double peak flows, with effects persisting 15 years after the cut. Clearcutting also increases surface run-off leading to stream sedimentation and threatening spawning and nursery areas for aquatic biota. The Wisconsin BMP monitoring project has not included any sites on the Reservation and this project only includes properties where the landowner allows access. According to the WIDNR 2002 BMP Monitoring Report (Attachment R), BMPs were not followed or followed incorrectly in approximately 24% of timber sales visited. This rate of noncompliance for the region, or a higher rate, probably exists on private cuts on the Reservation as well.

The County of Ashland distributes permits for cuts on private lands within the Townships included within the exterior boundaries of the Reservation. According to the annual summary reports and data available on Plat maps, in 2003 permits were issued for cutting of timber on 3,966 acres within the Reservation and in 2004 permits were issued for cuts on 149 acres.

The Tribe follows its Integrated Resources Management Plan (Attachment S) in planning cuts. The Plan indicates best management practices to be used in protection of water quality. Any private entities that require access permission from the Tribe to reach their landlocked properties are required to follow best management practices as well. The Tribal forester is able to shut down these types of timber cuts if the IRMP is not followed. However, other private cuts not requiring access permission have no oversight by the Tribe and compliance with any BMPs is not known.

In the fall of 1998, a private logger harvested timber to the Bad River near the area known as the Falls (slides reproduced for Attachment T). The Tribe was able to convince the responsible party to put erosion controls in place and re-seed the road by applying pressure with the threat of legal action. No information currently exists on how much clear cutting occurs on private land within the Reservation but this incident shows that it does occur and that the Tribe needs clear authority to protect its waters from improper landuse practices within the Reservation.

4) Threats to Subsistence and Cultural Resources

Lake Superior tributaries up to the first blockage are under fish advisories for polychlorinated biphenyls (PCBs) (several species at different sizes) and mercury (walleye). The Tribal population is potentially significantly effected by these advisories, as fish consumption is

a major component of the traditional and modern-day Tribal diet. (Attachment U) Results of fish tissue mercury analysis show fish tissue mercury concentrations ranging from less than 0.1 ppm for a sucker to 0.15 ppm to 0.59 ppm for approximately 15-inch and approximately 24-inch walleye respectively. (Attachment V) The EPA Guidance for chemical contaminant data in developing fish advisories recommends 0.029 ppm methylmercury as the limit in fish tissue for unrestricted consumption. The 2001 EPA water quality criteria for mercury is a fish tissue concentration of 0.3 ppm.

Studies on trapped otter fur carried out by the Tribe in 1998 show high levels of mercury. The source may be sea lamprey or fish the otter feed on, but no conclusions can yet be drawn. Sea lamprey found in Bad River were analyzed for mercury and found to have levels high enough to exclude them as a possible food source on the Asian market. (Attachment W).

Tribal elders report a marked decline in the extent of the wild rice beds on the reservation although the cause is unknown. This decline is probably due to many factors including increased boat traffic and naturally fluctuating lake levels. The Tribe is very concerned about the wild rice beds and is continuing ongoing studies to determine their health. (Attachment F, pp. 285-286)

A 1996 study by Dr. Peter Lee of Lakehead University in Thunder Bay, Ontario found that all heavy metals studied (aluminum, copper, cadmium, lead, mercury) had a significant impact on the growth and germination of wild rice. (Attachment X) None of these metals were detected in water samples from the Sloughs taken in 1998 by Tribal Water Resource. However, detection limits were slightly higher than the levels seen to have effects in the Lee study. Low levels of copper, well below sediment criteria, were found at a few places in the Sloughs. Any future discharges containing metals could negatively affect the rice.

Activities by non-members that appear to be contributing to the decline in wild rice quality and production on the Reservation have been the target of protracted protests by tribal members. The affect of boat wakes on floating stage wild rice is well documented in the literature. Large numbers of non-member boats have been observed on the Kakagon Slough on more than one occasion (over 182 boats were observed by fly over on 6/9/96). The Band has enacted a "slow-no-wake" ordinance as an attempt to protect the rice. This effort was only successful after much discussion over authority on the waterways of the Slough. As the State does not agree that the Tribe has legal authority in the Sloughs, the State wardens would only enforce a "slow-no-wake" ordinance on non-members after a local township had adopted the ordinance also. Although the authority sought here does not impact the Band's ability to control boat activity on the Reservation, it highlights the need for the Band to control water quality in order to protect the rice through all other means possible in order to mitigate the threats of the uncontrolled elements.

Since the waters of the Reservation are impacted by off Reservation sources as well as sources within the Reservation, it is very important the Tribe have the authority to protect all waters of the Reservation from activities occurring on the Reservation. The potential impact of improperly regulated water quality on the Band is sufficient to meet not only the Montana criteria, but also the criteria of the "interim operating rule" adopted by the EPA, which requires

tribes to show “that the potential impacts of regulated activities on the Tribe are serious and substantial.” 56 Fed. Reg. 64, 878 (1991). The EPA states that the activities regulated under the various environmental statutes “generally have serious and substantial impacts on human health and welfare.” The potential impact on the health and welfare of tribal members from improperly regulated sources of pollution within reservation boundaries is serious enough to merit appropriate water quality management and regulation by the Band under the Clean Water Act.

5) Illegal dumping

In the late 1960s and early 1970s, papermill de-inking sludge was dumped in at least two sites on the Reservation. The sludge contains lead, low levels of dioxins and PCBs and several volatile organics. One site was permitted by the DNR as a landfill on non-tribal land. That land is now ineligible for transfer to Tribal Trust even though the property was transferred to the Tribe. The other site is unregulated and located on County land within the Reservation. The Tribe, in cooperation with the USEPA, BIA, and USGS, has been investigating these sites under CERCLA for potential groundwater contamination and possible clean up since 1994. The sludge itself contains several contaminants but is not considered a hazardous waste. There is much so concern in the tribal community about these sites and their effect on the Tribe’s ground water resources that the Tribe is currently paying for bottled drinking water for members in a quarter-mile radius around the unregulated site.

Illegal dumping of household garbage, metal objects and deer carcasses occurs regularly in several areas of the Reservation, including bridges over streams. In the past this garbage has been linked to non-members through addresses on envelopes in the trash.

6) Threat of an open pit mine in the Penokee Range

While off-reservation activities are not controlled by the programs sought here, the possible activation of over 30,000 acres of land owned by mining interests in the hills of the recharge area of the watershed is a serious threat to the water quality of the reservation waters, that it underscores the need for the Tribe to regulate the impacts of activities affecting water quality on the reservation in order to mitigate the effects of off-reservation impairment. A single owner purchased all of the land previously owned by US Steel in April 2004. Representatives of the mining companies have recently given presentations at several town meetings in the area, urging residents to add mining to land use plans with the promise of jobs for 40 years to come. (Attachment Y) The publicly presented plans are vague and do not include details such as location of waste rock piles, water use and discharge, location of buildings, or actual skills needed for local residents to be employed. Several of the Towns with the ore deposit within their border are adding metallic mining as a possible future land use. Applications for exploration permits have not yet been submitted to the State of Wisconsin.

Iron ore mining in this area has the potential to seriously impact the water resources of the watershed, both ground water and surface water. Twenty-three streams of the Bad River Watershed meander through the range over the ore deposits, including the Bad River itself. Eighteen of these streams have headwaters in the iron range. The creation of an open pit mine in

this area would negatively affect the headwaters of the streams that run through the Reservation by completely removing the land base through which it flows. A change in flow to the waters of the Reservation could impact fish habitat and the surrounding riparian area, changing the useable habitat for the fish and wildlife the Tribe depends on for subsistence.

Open pit mining could seriously impact the groundwater resources in the area through drawdown pumping during operations and impact surface water levels through the connection to groundwater. Negative impacts to water resources continue for decades after a mine closes, groundwater drawdown ceases and the groundwater continues to well out. Rock exposed to air is capable of producing acids that increase the speed of metals leaching from the rock that is removed, contaminating the groundwater that flows out. Groundwater is the only drinking water supply on the Reservation, thus the health of Tribal members could be negatively affected by groundwater contamination by mining activities. It is extremely costly to treat contamination in ground water or purchase bottled water for a whole community.

Constituents leached from overburden and waste piles, both metals and particulate matter, may directly impact surface water resources. Depending on the mine, waste rock piles may occupy hundreds of acres, leaving a large possibility of negative impact to surface waters through runoff and of wetlands by filling. The fact that a large number of Superfund sites are abandoned mine areas illustrates the long-term potential for environmental impacts. This off Reservation threat to the quality of water that runs through the Reservation serves to emphasize the need for the Tribe to be able to protect all waters within the Reservation from threats within the Reservation in order to protect its members.

B. Express Delegation from Congress

In addition to its inherent authority to regulate waters within its jurisdiction, the Band has been delegated authority to regulate water quality by Section 518 of the Clean Water Act, 33 U.S.C. § 1377(e). The United States Supreme Court has repeatedly stated that tribes may have authority over the activities of non-members on fee lands within the boundaries of their reservations if such authority has been delegated to them by Congress. Montana v. United States, 450 U.S. 544, 564 (1981), Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408 (1989). United States v. Lara, 541 U.S. 193 (2004). Congress has the authority to authorize Tribes to exercise jurisdiction over non-members when those matters affect the internal and social relations of tribal life. United States v. Mazurie, 419 U.S. 544 (1975); Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2001)(*en banc*); City of Timber Lake v. Cheyenne River Sioux, 10 F.3d 554 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2741 (1994). The narrative in the Bad River Tribe's application, repeated above, gives clear evidence that the quality of the waters of the Bad River Reservation affect both internal and social relations of tribal life.

Under the terms of the Clean Water Act,

[t]he Administrator is authorized to treat an Indian tribe as a State for purposes of . . . sections . . . 1313 [water quality standards and implementation plans, . . . [and] 1341

[certification] . . . of this title to the degree necessary to carry out the objectives of this section, but only if

...

(2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation.

33 U.S.C. § 1377(e). If Congress had intended that tribes would have authority to promulgate water quality standards only for lands held by the tribes or by tribal members, it would not have included the last phrase, "or otherwise within the borders of an Indian reservation." Because all other lands are included in the preceding phrases, the exclusion of non-tribally held fee lands from a tribe's authority would render the final phrase a nullity, a result that the United States Supreme Court has held that it will not countenance. Justice White, writing for the plurality, acknowledged the above statutory language as an express delegation of authority over the land of non-members. See Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408, 428 (1989) citing 33 U.S.C Sec. 1377(e) and (h)(1).

To find that the Band does not have the authority to regulate all surface waters within the borders of the Bad River Reservation regardless of land ownership would create the possibility that tribally-managed programs would have fewer or less effective regulatory tools than do state programs in the surrounding area; the Band does not believe that Congress could have intended such a result. In addition, the Band agrees with the EPA that a "checkerboard" system of regulation is not effective or feasible and that "Congress has expressed a preference for Tribal regulation of surface water quality to assure compliance with the goals of the CWA." 56 Fed. Reg. 64,878 (1991).

Clearly, Congress believed when it enacted Section 518 that tribes would regulate water quality for all waters within their reservations pursuant to that section, regardless of land ownership. Given the congressional "plenary power" over Indian Tribes under federal Indian law, it matters little whether Congress believed that it was acknowledging tribes' inherent authority to regulate in this section, or whether it believed it was delegating authority. If the Supreme Court's "plenary power" doctrine means anything, it means that it is for Congress rather than the Court to say what degree of a tribe's inherent sovereignty the United States will recognize. The Court's role is limited to determining the intent of Congress as expressed in various treaties and statutes. The Court established the Montana rule based on an extensive analysis of Congressional action in opening reservations to non-Indian settlement. Montana at 559-565, footnotes 7-12. Because Congress had not explicitly stated the degree to which it intended to continue to recognize inherent tribal sovereignty in areas settled by non-Indians, the Court was left to make a reasoned guess as to what Congress intended. In the area of the regulation of water quality, however, Congress *has* explicitly stated that the EPA may authorize an Indian tribe to establish and administer its own water quality program in all areas within the borders of its reservation. This may mean that Congress has delegated such authority to tribes;

alternatively, it may mean that Congress has indicated that the United States recognizes the inherent authority of tribes to regulate such waters. Under either interpretation, according to the Supreme Court's own rulings, the Court does not have authority to negate Congress's clearly intended result.

Conclusion

The Bad River Tribe's existence cannot be separated from the waters within and which flow through the Bad River Reservation. As demonstrated in the Band's application, Tribal members rely upon the water, the game, the fish, and the wild rice for basic subsistence. The health of these resources impacts the health of the Band, its members, and its overall welfare.

Threats to the resources threaten the economy of the Band. Tribal members depend upon harvest of the resources not only to earn an income, but to provide their own food source, which is particularly important given the depressed income levels of the Band. More generally for the Band, a healthy water-based environment encourages visitors to the Band's economic enterprises, the income from which supports basic government functions. Degradation of the resources depletes the revenue source from which the Band meets the basic needs of its members such as housing and healthcare.

The Band's identity is integrally linked with the health of its reservation waters spiritually, culturally, and politically. Non-member activity on the reservation significantly impacts the reservation water. Off-reservation impacts also significantly affect the water quality. Both the internal and external impacts emphasize the need for the Band to take critical steps to ensure that any on-reservation activity does not further diminish the quality of the Band's waters, and subsequently, its health, its culture, its economy, or its sovereign existence.

The Band knows its waters best. It has been caring for its water since the days of the migration story. Modern techniques allow the Band to even better protect and care for its waters. The Bad River Tribe easily meets the requirements EPA has established following the Montana test, and has met the requirements set out by Congress, and interpreted by the EPA, to receive authority for treatment as a state under the Clean Water Act.

Sincerely,



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